as amended April 18, 1928, c. 379, 45 Stat. 431. The estate condemned is an easement of flowage upon the shores of the Lake of the Woods. The Lake of the Woods is a large body of water, partly in Canada and partly in the State of Minnesota. The surface area of the lake is approximately 1,500 square miles, with its outlet by the Winnipeg River in Canada.

In 1898, the Keewatin Power Company (a Canadian corporation) by agreement with the Crown, constructed for purposes of navigation a control dam (the Norman Dam) in Canada near Kenora. (R. 237, 417.) It utilized the lake as a reservoir and caused an average rise in the lake level of about three feet, with resulting invasion of shore lands. The flooding of the shore lands has intermittently continued since 1898 and is substantially the level to be maintained hereafter. The lands or easements involved here are the shore lands so affected.

In 1909, a treaty was entered into between the United States and Great Britain with respect to Canada "relating to boundary waters" which created the International Joint Commission, with jurisdiction over such waters. (36 Stat. Pt. 2, pp. 2448, 2451.)

Shortly thereafter the Lake of the Woods situation was referred to the Commission. After extensive studies, the final report of the Commission was submitted to the two Governments in 1917. (Final Report of the International Joint Commission.) As a result, in 1925 a treaty was entered into

between the United States and Great Britain in respect to Canada "to regulate the level of the Lake of the Woods" and putting into effect the recommendations of the International Joint Commission, with a flowage easement on the Minnesota shore lands to be acquired. (44 Stat. Pt. 3, p. 2108.)

To carry into effect this treaty the Act of May 22, 1926, 44 Stat. 617, as amended by the Act of April 18, 1928, 45 Stat. 431, was passed, in which the Secretary of War was required to acquire, by purchase or condemnation, "flowage easements up to elevation 1,064 sea-level datum upon all lands in such State [Minnesota] bordering on the Lake of the Woods, Warroad River, and Rainy River, * * *"

Being unable to secure these flowage rights on various tracts by purchase, a condemnation proceeding was instituted in which was included lands owned by these petitioners.

Commissioners appointed by the District Court for Minnesota in the condemnation proceedings made awards from which the present petitioners appealed to the District Court, where their cases were consolidated for trial (R. 21) for the purpose of tendering an issue of law as to the admissibility of evidence of the contribution of Lake of the Woods to the development of hydroelectrical power on the Winnipeg River and the advantage to such development that might be derived from the storage of water on the shores of the lake. This

testimony was proffered (R. 162) upon the theory that compensation should be made on the basis of "reservoir values" of the shore lands.

When this testimony was presented the United States objected (R. 25), and moved the court (R. 136) for leave to offer evidence as a foundation for its objection. This motion was granted (*ibid.*) and the Government laid before the court all of the physical characteristics of the lake, with a shore line, including islands, of over 3000 miles (R. 138), comparable to the shore mileage of our Great Lakes. The Government also proved the multiplicity and diversity of titles in the Governments and citizens of the United States and Canada, Minnesota, Manitoba, and Ontario, and in many Indian Tribes in Canada, and the resulting *impracticability of effecting the unification of ownership requisite to its use as a storage reservoir;* the conflict of interests, public and private, in the uses of these international waters for navigation, fishing, domestic and sanitary uses, lumbering, agriculture, and water power, each of which could invoke the protection of the Webster-Ashburton Treaty of 1842 (8 Stat. 572), and the Boundary Waters Treaty of 1909 (36 Stat. Pt. 2, 2448), through one of the five sovereignties involved; two nations (Canada and the United States), two provinces (Manitoba and Ontario), and one State (Minnesota), so that there was no reasonable prospect that any demand should arise for water power uses of the lake, because under the circumstances here, it was *impossible to*

secure authority to regulate the level of the lake without international negotiations for the protection of the various public and important private interests, and the acquisition of flowage rights under governmental sanction (eminent domain). It was likewise shown by original Government Exhibit No. 64, the pertinent parts of which are printed at R. 237, that the *Dominion of Canada* as early as June 22, 1898 (before ever the lands on the American side of the lake were opened for homestead entry (R. 210)), *had become vested with the power and authority to control the outlets of the lake in the interests of navigation.* Inasmuch as outlet control was essential to make level control and the union of necessary properties of any use to the one who secured them, the control of the outlets in the interest of navigation, removed the possibility of securing outlet control for water power purposes. Hence water power utility of the shore lands was not an element of value for which compensation should be made.

Finally, as a further foundation for its objection to the testimony concerning "water power values", the Government showed that *the lands condemned,* by virtue of the laws under which they were opened for *homestead entry, were subject to the right of the United States to overflow them to indeterminate levels in aid of navigation* without payment of compensation. (R. 32.) The court sustained the Government's objection to the introduction of

petitioners' evidence of water power values (R. 27), and withdrew from consideration by the jury (R. 130, marg. 166), as an element of value for which compensation should be made, the physical possibility that petitioner Olson's land, comprising 56 acres out of a total of 78,081 acres (R. 98, 160), could be used in conjunction with over 1500 privately owned tracts (United States 850 (R. 137), Canada 723 tracts (R. 225), and the lands of two nations[2] (R. 163), two provinces, *ibid.*, one State (R. 163) and many Indian Tribes (R. 224, 261, 263, Map)), as a part of a reservoir for the storage of water to make the potential power of falls in the Winnipeg River available both in dry seasons and in wet, to persons who might construct the facilities for that purpose.

An appeal was taken from the judgment of the District Court to the Circuit Court of Appeals for the Eighth Circuit, which affirmed the judgment (R. 429), Circuit Judge Booth dissenting. The sole ground relied on by the court was that the possibility of assembling the numerous tracts requisite for use of the shores as parts of a reservoir was too remote and speculative to have any legitimate effect upon values (*McGovern* v. *New York*, 229 U.S. 363, 372); and "with no further examination of the difficulties urged by appellee" held that "the trial court correctly excluded consideration of this flowage use as an element of value". (R. 428.)

---

[2] Final Report, International Joint Commission on Lake of the Woods, p. 61.

This case comes before this Court upon a petition for writs of certiorari directed to the Circuit Court of Appeals for the Eighth Circuit.

ARGUMENT

Petitioners' "Statement" is followed by a recital designated in their brief as "ESTABLISHED FACTS", which requires certain corrections. So far as material to the issues now raised these corrections are as follows:

1. At page 6 of their brief petitioners state:

> The storage reservoir [for hydroelectrical purposes] has been maintained and used intermittently since that date [1898] (R. 22, 24).

The evidence cited merely states that when the Norman Dam was built in 1898 it was for the purposes of power development and *at that time* it created a power storage reservoir in Lake of the Woods. What petitioners fail to show is that on June 22, 1898, the Dominion of Canada assumed control of the Norman Dam by "Agreement Between the Crown * * * and Keewatin Power Company" (R. 237) for the express "purpose of improving the navigation of the said lake [of the Woods]". *Subsequently* (October 13, 1898, and June 15, 1904, R. 210) lands on the American side were opened for homestead entry; and it was not until 1926 (a year after the treaty permitting fluctuation of levels) that the Norman Dam was used

for power purposes. The idea that the lake has been used as a storage reservoir for power purposes has, therefore, no support in the undisputed testimony in the record.

2. The statement, at page 6 of petitioners' brief, that—

> It [the storage reservoir] has increased the power capacity of the Canadian hydro-electric plants in the Winnipeg River by about fifty per cent or approximately 200,000 continuous horse-power (R. 35, 50)—

may be corrected by an exact quotation of the evidence (R. 35):

> 4-c. Respondents further offer to prove by said witness that the continuous power that could be developed at the outlets of the lake, with the lake utilized as a storage reservoir and the waters controlled as contemplated by the treaty, would be increased, as compared with natural conditions, in the same relative proportion as the average dependable outflow, that is, about 50%.

The citations of petitioners show on their face that the electrical plants referred to in the testimony are not the existing plants, but mere "projects" (R. 50).

3. At page 7 of their brief petitioners state:

> Under the easement acquired pursuant to Treaty, said lands will continue to be subjected to practically the same *use* and burden as during the past thirty years (R. 22–23). (Italic ours.)

The fact is that while the "burden"—the extent and frequency of flowage—will be about the same under the treaty as under the control for navigation purposes by the Government of Canada (R. 22–23), the *use* will be for the aggregate of purposes set forth in Article II of the Treaty of 1925. The point is, that it is not correct to say the lands have been used for power storage during the past thirty years.

4. The testimony noted on page 7 of petitioners' brief that—

> It would have been entirely practicable for the * * * competing interests to have acquired said flowage easement—

while contained in a rejected offer of proof, obviously states a conclusion of law. The point made by the witness is the very point at issue in the case: whether any prospective bidder existed whose demand for the use could enhance the value of the lands for that use. That question was for the court, not for the witness.

5. The following statement at pp. 7–8 of petitioners' brief is based upon offers to prove (R. 59) that higher prices were paid for shore lands because of the fact "that the land was valuable and was reputed to be valuable for flowage and storage purposes"—

> Because of the adaptability and actual use of said shore lands for reservoir purposes, and the general interest created therein, their

> market value was increased and higher prices paid for them (R. 58–59, 64–66, 68–69, 71–72, 105–106).

Strictly speaking, the petitioners' statement should read:

> Because of the *reputed* adaptability and the *supposed* actual use of said shore lands for reservoir purposes, etc.

higher prices were paid; but substantially the offer of proof cited would have to be answered by the following argument:

1. A mistake of fact as to the elements contributing value to property does not justify evidence in court of the elements erroneously considered by buyers. Hence, if the barriers to reservoir use of the shore were such as to make a realization of that use speculative and conjectural, a mistaken belief of buyers that the land was worth more because of such utility, does not make such utility any the less speculative. The fact that buyers were deceived as to the practical possibilities of creating a reservoir does not justify proof of such possibility, if as a matter of law it could not occur.

2. In any case the "higher prices" paid were induced by hope of a governmental taking. Any rise in values caused by the expectation of public expropriation must be left out,—otherwise we destroy the function of eminent domain as a sovereign right to secure a public improvement at a cost that is just to the public (*Searl* v. *School District,* 133

U.S. 553, 562; *Garrison* v. *City of New York,* 21 Wall. 196, 204) as well as the landowner. That values arising because of particular improvement cannot be included in compensation is shown by the cases cited by the Circuit Court of Appeals in its opinion (R. 428). The decision in *New York* v. *Sage,* 239 U.S. 57, 61, also makes that point clear. Mr. Justice Holmes there said:

> Any rise in value before the taking, *not caused by the expectation of that event,* is to be allowed * * *. (Italics ours.)

If "higher prices" were paid because of reputed reservoir values, the enhancement was caused by the expectation of a taking by the Government. This may be inferred from the following circumstances:

While the landowners offered to prove certain sales prior to the treaty which authorized the artificial levels of the lake, no offer of proof was made of any sale prior to the reference to the International Joint Commission of the question of the most advantageous use of the waters of the Lake of the Woods. This reference was in 1912 (Final Report of the International Joint Commission on the Lake of the Woods Reference), and it was the question of reference, the investigation and hearings of the Commission and the recommendations for a treaty substantially as signed in 1925, that induced the belief that money could be made

by obtaining lands on the shores of the lake. All of the offers of proof referred to at page 49 of appellants' brief in the Circuit Court of Appeals, excepting the offer by the witness Olson (R. 97) refer specifically to "lands below 1064". This contour line was the level that was discussed by and before the International Joint Commission as the probable upper limit of the easement of flowage. It was not finally fixed, however, until the Treaty of 1925 was signed. This circumstance tends to show that it was the treaty that induced purchase of flowage lands. But even if enhancement occurred before the treaty was signed, it occurred because of the steps looking toward a governmental taking, and in principle the decisions which forbid the inclusion of values arising from the improvement should forbid the inclusion of reservoir value as an element of damage in this case.

The brief in support of the petition for certiorari, page 8, relies on evidence that persons actually paid more for land because of reputed flowage value. While it is true that such payments, according to the offers of proof, were made prior to the treaty, the evidence was nevertheless inadmissible because the enhanced prices were paid in the hope of reimbursement as a result of a governmental taking.

RESPONSE TO PETITIONERS' POINTS

I

Under Point I of their argument petitioners assert (pp. 15–16):

> The decision of the Circuit Court of Appeals by a divided Court, has construed the *Treaty* of 1909 to mean that American property owners whose property is damaged on the American side because of interferences with boundary waters on the Canadian side of the boundary, have no right either to enjoin the trespass or to recover damage therefor.
>
> That construction of the Treaty is necessary to the decision of the majority of the Court. No other reason is given for excluding from consideration the actual use value, which the Court has found to exist in fact.

The answer to this claim is four-fold.

1. The Treaty of 1909 is not involved.

This is shown by the last clause of the following excerpt from Article II of the treaty which is omitted from petitioners' argument on the point and as it is quoted in Judge Booth's dissenting opinion (though set forth in the "pertinent parts" quoted in petitioners' Appendix A):

> ARTICLE II. * * * any interference with or diversion from their natural channel of such waters on either side of the boundary, resulting in any injury on the other side of the boundary, shall give rise to the same rights and entitle the injured

> parties to the same legal remedies as if such injury took place in the country where such diversion or interference occurs; *but this provision shall not apply to cases already existing, or to cases expressly covered by special agreement between the parties hereto.* (Italics ours.)
>
> * * * * *

Now, the trespass relied on was a "case already existing" when the Treaty of 1909 was made. This is shown by the record (R. 22), and by the following statement of the dissenting opinion (R. 430):

> Both the building of the Rollaway dam in 1887 and the building of the Norman dam in 1895–98 had produced trespasses by flowage upon the lands here involved. These trespasses were committed either by private parties or by private parties jointly with the Canadian government. They continued down to the time of the present condemnation proceedings. These trespasses are conceded in the majority opinion, and it is further conceded that these trespasses established the physical adaptability of the lands for flowage purposes.

Manifestly there is no occasion for involving the Treaty of 1909 in the discussion or seeking its construction by the Supreme Court, for it has no application to cases "already existing" when the treaty was made.

2. If that treaty had been applicable to "cases already existing" it would have created no right of redress for the flowage in this case.

In cases not "already existing" the treaty confers "the same rights and entitle the injured parties to the same legal remedies *as if such injury took place in the country where such diversion or interference occurs*" (italics ours). The treaty right, therefore, is a right that the owners of property in Canada would have if the injury took place there. While the Crown permits redress of grievances by Petition of Right, as indicated in the dissenting opinion of Judge Booth, such an action does not lie for this character of tort.

In his judgment in the case of *Yates* v. *The King*, 20 Ex.C.R. 175, where the suppliant, by his Petition of Right, claimed to be the owner of certain lands in the Town of New Liskeard, which were overflowed and flooded as a result of the construction, in 1912, of a dam at the southern end of Lake Temiskaming, by the Department of Public Works of the Dominion of Canada, Audette, J. stated (p. 177):

> The action is for the recovery of damages to land and is therefore in its very essence one sounding in tort. Apart from breach of contract or from special statutory authority, no such action will lie against the Crown * * *.
>
> The respondent, in the present case, has not expropriated (The Expropriation Act, R.S.C. 1906, ch. 143, sec. 2, sub-section f.—sec. 3) the easement to flood the suppliant's land and it therefore follows that the Court has no jurisdiction to entertain the claim under the Expropriation Act.

See also *Sisters of Charity* v. *The King*, L.R. (1922) 2 A.C. 315.

Therefore, the Treaty of 1909 created no right of redress for the flowage as a result of interference with the waters of the lake on the Canadian side by the Canadian Government for the improvement of navigation (R. 237).

3. Assuming that the treaty conferred a right of action for trespass by flooding it begs the question to say that reservoir values are thereby established, unless such values could be recovered in an action under the treaty. Evidence of such values would be inadmissible in an action under the treaty for the same reason that they were held inadmissible in this case; valuations based on reservoir utility of land would be speculative and conjectural, because the diversity of titles was such as to make unification out of the question. Hence the assumption of a right of action under the treaty begs the question of admissibility of reservoir values. If this treaty applied at all it would merely give a right to recover for the actual physical damage to the shore lands by water. It does not give those lands a market value for reservoir purposes, if they could have no such value to a buyer or seller of individual tracts. And if the possibility of union of tracts necessary for a reservoir was too remote to influence market values no damages could be recovered on that basis. Accordingly, the Treaty of 1909 has no bearing on the issues of this case in any view.

It should be further noted that petitioners are quite wrong in saying (Br., p. 16) "no other reason is given [than the Treaty of 1909] for excluding from consideration the actual use value, which the Court has found to exist in fact."

The reasoning of the lower court detailed in the record (pp. 423 to 428) shows that the principles on which the decision rests, viz., that uses which are "too remote and speculative to have any legitimate effect upon the valuation" are to be excluded; and that potential uses "are remote and speculative if the use depends upon the union of numerous tracts, variously owned, and such union is improbable * * *" (R. 426).

4. Finally, all responsibility of Canada for fluctuation of the levels of the Lake of the Woods has been removed by the following provision in Article IX of the Treaty of 1925:

> The United States and the Dominion of Canada shall each on its own side of the boundary assume responsibility for any damage or injury which may have heretofore resulted to it or to its inhabitants from the fluctuations of the level of Lake of the Woods or of the outflow therefrom.
>
> * * * * * *

Petitioners' sweeping statement (Pet. Br., p. 17) that the present "decision is of far-reaching importance in the harmonious relationship between the United States and the Dominion of Canada" is quite out of place in this case, for our relationships with Canada on this score have been set at rest by

the Treaty of 1925. Hence, no occasion whatever is presented for a construction by the Supreme Court of the Treaty of 1909.

II

Under this head petitioners state (p. 17):

> The Circuit Court of Appeals' decision squarely conflicts with *Ford Hydro-Electric Company* v. *Neely,* 13 Fed. (2nd) 361, Seventh Circuit, and with *Weiser Valley Land & Water Company* v. *Ryan,* 190 Fed. 417, Ninth Circuit.

From an examination of the *Ford* case it appears that petitioner's claim involves an obvious misapprehension of the holding both in the *Ford* case and in the instant case. The holding in the *Ford* case is that (p. 362) "where the lands sought to be condemned are not the whole of the lands needed, but only a part thereof * * *", that fact standing alone is not a conclusive ground for excluding evidence of reservoir value. Nothing in the decision of the court below in the instant case impairs in any degree the decision in the *Ford* case. On the contrary, the decision below is in strict accord with the *Ford* case in recognizing (R. 425) that potential uses may be taken into account even though such uses can be made only in connection with other tracts, provided that the possibility of union of the necessary properties is considerable enough to be a practical consideration.

In the *Ford* case, counsel for the condemnor took the position that the utility of the lands for a special purpose could *never* be shown if such utility was available only in conjunction with other lands.

The Supreme Court had expressly held in *New York* v. *Sage* (1915), 239 U.S. 57, 61:

> The fact that the most profitable use could be made only in connection with other land is not conclusive against its being taken into account, if the union of properties necessary is so practicable that the possibility would affect the market price.

The test therefore *is not* whether the use relied on is possible only in conjunction with other tracts, but *whether "the union of properties necessary is so practicable that the possibility would affect the market price."*

In the instant case the Government proved the impracticability of union of titles as a foundation for its objection to testimony of potential utility (R. 138 *et seq.*); in the *Ford* case the condemnor relied solely on the bare fact that such utility required union of titles to the lands in suit with other lands. That circumstance alone does not make evidence of potential utility incompetent; but when it is proved that the chance of unification is impossible of realization, then diversity of titles is a bar to evidence of potential uses which have no value without unification.

In the instant case the court held that the possibility of union was not so practicable as to affect

market prices, and the evidence of the impracticability of uniting titles was deemed conclusive.

In the *Ford* case, on the other hand, plaintiff in error "planted itself upon the incompetency of evidence" upon the sole ground (without laying a foundation for the objection by first proving the impracticability of union) that the witness "considered the lands as a part of a united whole * * *". (P. 362.)

The *Ford* case merely holds that such testimony is not *per se* incompetent.

Such testimony may obviously become incompetent when proof is made that a "united whole" is impossible of realization save by international agreements and eminent domain proceedings in which the question is raised.

The *Ford* case is, therefore, not in conflict with a decision which holds that the evidence conclusively shows the impracticability of so uniting all the lands as to impart a fractional market value to petitioners' segment as part of a completed reservoir.

In *Weiser Valley Land & Water Co.* v. *Ryan*, 190 Fed. 417, the question of multiplicity of titles was not raised in any form, either as a bar *per se* to evidence of the availability of lands for uses that were possible only in conjunction with others, or on the ground that the possibility of union was too remote to influence market values. So far as the opinion shows, only two titles necessary for a

reservoir were outstanding (p. 418). As to the measure of damages, the court simply states (p. 421):

> The proper basis of inquiry is, What were the lands worth in the market? And this establishes the measure of damages.

The *Ford* case, the *Weiser Valley* case and the instant case all conform to the settled principle laid down by the Supreme Court in *New York* v. *Sage* (239 U.S. 57, 61):

> The decisions appear to us to have made the principles plain. No doubt when this class of questions first arose it was said in a general way that adaptability to the purposes for which the land could be used most profitably was to be considered; and that is true. But it is to be considered only so far as the public would have considered it if the land had been offered for sale in the absence of the City's exercise of the power of eminent domain. The fact that the most profitable use could be made only in connection with other land is not conclusive against its being taken into account, if the union of properties necessary is so practicable that the possibility would affect the market price. But what the owner is entitled to is the value of the property taken, and that means what it fairly may be believed that a purchaser in fair market conditions would have given for it in fact—not what a tribunal at a later date may think a purchaser would have been wise to give, nor a proportion of the advance due to its union with

> other lots. The City is not to be made to pay for any part of what it has added to the land by thus uniting it with other lots, if that union would not have been practicable or have been attempted except by the intervention of eminent domain. Any rise in value before the taking, not caused by the expectation of that event, is to be allowed, but we repeat, it must be a rise in what a purchaser might be expected to give.

Manifestly, this is the very rule of the decision which governed in the *Ford* and *Weiser Valley* cases, and which the lower court specifically applied when it held (R. 427–428):

> To assemble all of this flowage affected land would require acquisition of the rights of this great number of persons (including two Nations, one State, two Provinces, Indian Tribes and private persons) in this large number of separately and variously owned tracts. We cannot think that such an eventuality held that degree of probability or possibility which could affect the value of these lands and be an influence or consideration affecting, in the slightest degree, the minds of sellers and buyers thereof in arriving at a fair price therefor. Such use is too remote and speculative to have such effect in fact and, therefore, can have none in law.

Petitioners state (Br., p. 20) that in *Union Electric Light and Power Company* v. *Snyder Estate Co.*, 65 F. (2d) 297, the Circuit Court of

Appeals for the Eighth Circuit decided substantially the same question we have here, in the opposite way. Judge John B. Sanborn, who tried the present case in the District Court, was one of the judges of the Circuit Court of Appeals who sat on the *Union Electric* case. A mere inspection of the opinion (p. 304, paragraphs 14–17) shows that the special use there relied on was in no sense speculative, but, on the contrary, the property was already partly developed for such use, and the unification of titles was not involved. The court declared (p. 304) that—

> the admission of evidence touching the value of property appropriated in condemnation cases must be left largely to the discretion of the trial judge.

III

Point III alleges a probable conflict of the decision below with *Boom Company* v. *Patterson*, 98 U.S. 403, and *United States* v. *Chandler-Dunbar Company*, 229 U.S. 53. To support this claim petitioners state (Br., p. 21):

> The majority of the Circuit Court of Appeals decided that *where the special use is possible only through the exercise of eminent domain it must be excluded from consideration in estimating value.* This holding is in conflict with the decision of this Court in *U.S.* v. *Chandler-Dunbar Company, supra*, and *Boom Company* v. *Patterson, supra.*

If the statement in bold face type (italics *supra*) means what it says, it is sound law and not in conflict with the decisions cited by the petitioners; for eminent domain is never allowed to enhance the values awarded in the eminent domain proceedings.

Apparently petitioners meant to attribute to the Circuit Court of Appeals this holding:

> Where the special use is possible only through the exercise of eminent domain, it (*the special use*) must be excluded from consideration in estimating value.

This is not the law declared by the court below. The lower court's holding is plainly expressed in the following statement at the conclusion of its detailed discussion of the authorities (R. 426):

> The things we deem material to bear in mind in the foregoing statement of the law are that existing uses influence values; that potential uses are not considered if they are remote and speculative; that they are remote and speculative if the use depends upon the union of numerous tracts, variously owned, and such union is improbable and that *in determining such probability the power of eminent domain must be excluded.* (Italics ours.)

The holding, therefore, obviously is this: The power of eminent domain is not a factor to be considered in estimating the *probability of union* of tracts necessary for a special use.

In other words, the lower court held that eminent domain is not a relevant consideration in

determining whether the possibility of union of properties necessary is so practicable that such possibility would affect market price. This is quite different from the holding expressly alleged by petitioners that eminent domain must be left out in estimating value, if it is the only means of making a special use possible. It is also quite different from the holding petitioners apparently intended to ascribe to the court, namely, that the necessity of employing eminent domain to acquire the property forbids its valuation on the basis of a special use, regardless of values otherwise arising from availability for such special use.

The ultimate fact sought is fair sales value; and it is clear, *first,* that special uses may influence such value whether the property is acquired by eminent domain or by purchase; and, *second,* that the probability of acquiring all the titles necessary for a special use also influences the fair sales value of each tract. In the first case neither the necessity for nor the fact of the exercise of eminent domain forbids valuations based on special utility and the lower court did not hold otherwise; in the second case, eminent domain is not a proper factor to be considered in estimating the probability of union, for its inclusion would rob the power of eminent domain of its essence as a right to secure a public improvement at the fair market price, a cost that is fair to the public as well as to the landowner. *Searl* v. *School District,* 133 U.S. 553, 562; *Garrison* v. *City of New York,* 21 Wall. 196, 204.

Since the lower court did not declare any such principle of law as petitioners state and criticize under their Point III, an analysis of the cases they cite is unnecessary. It may, however, be noted that in two of them, *United States* v. *Chandler-Dunbar Company,* 229 U.S. 53, and *Boom Company* v. *Patterson,* 98 U.S. 403, multiplicity of titles was in no way involved; and in the *Chandler-Dunbar* case itself the Court said (p. 76):

> The value should be fixed as of the date of the proceedings and with reference to the loss the owner sustains, considering the property in its condition and situation at the time it is taken and not as enhanced by the purpose for which it was taken. *Kerr* v. *South Park Commrs.,* 117 U.S. 379, 387; *Shoemaker* v. *United States,* 147 U.S. 282, 304, 305.

Obviously this forbids the inclusion of values created by the taking itself, and *Kerr* v. *South Park Commissioners,* 117 U.S. 379, which petitioners assert broadly (Pet. Br., p. 23), does not support the lower court, in fact sustains both the lower court and the decisions alleged to be in conflict.

As for the other two cases cited under Point III, *McGovern* v. *New York,* 229 U.S. 363, and *New York* v. *Sage,* 239 U.S. 57, the following excerpts show that in each the court declared the very principle followed and applied by the lower court in this case:

McGovern v. *New York, supra,* at page 372:

> There are said to have been hundreds of titles to different parcels of that land. If the parcels were not brought together by a taking under eminent domain, the chance of their being united by agreement or purchase in such a way as to be available well might be regarded as too remote and speculative to have any legitimate effect upon the valuation. See *Chicago, Burlington & Quincy R.R. Co.* v. *Chicago,* 166 U.S. 226, 249. The plaintiff in error was entitled to be paid only for what was taken from him as the titles stood, and could not add to the value by the hypothetical possibility of a change unless that possibility was considerable enough to be a practical consideration and actually to influence prices. *Boston Chamber of Commerce* v. *Boston,* 217 U.S. 189, 195. In estimating that probability the power of effecting the change by eminent domain must be left out. The principle is illustrated in an extreme form by the disallowance of the strategic value for improvements of the island in St. Mary's River in *United States* v. *Chandler-Dunbar Water Power Co., anté,* p. 53.
>
> The plaintiff in error relies upon cases like *Mississippi &c. Boom Company* v. *Patterson,* 98 U.S. 403 to sustain his position that while the valuation cannot be increased by the fact that his land has been taken for a water supply still it can be by the fact that the land is valuable for that purpose. The

difficulties in the way of such evidence and the wide discretion allowed to the trial court are well brought out in *Sargent* v. *Merrimac,* 196 Massachusetts, 171. Much depends on the circumstances of the particular case.

New York v. *Sage, supra,* at page 61:

> The City is not to be made to pay for any part of what it has added to the land by thus uniting it with other lots, if that union would not have been practicable or have been attempted except by the intervention of eminent domain. Any rise in value before the taking, not caused by the expectation of that event, is to be allowed, but we repeat, it must be a rise in what a purchaser might be expected to give.

IV

As Point IV the claim is made:

> The decision of the Circuit Court of Appeals is contrary to the provisions of the Treaty of 1925, and Act of May 22nd, 1926.

No argument is offered in support of this claim except the statement (Pet. Br., p. 24) of Judge Booth in his dissenting opinion (R. 432, 438):

> That Article provided [Art. IX, Treaty of 1925]:
>
> "The United States and the Dominion of Canada shall each on its own side of the boundary assume responsibility for any damage or injury which may have heretofore resulted to it or to its inhabitants from

the fluctuations of the level of Lake of the Woods or of the outflow therefrom."

* * * * * *

The Statute above quoted (44 Stat. 617) provides for an ascertainment of damages to the landowners by reason of flowage prior to the treaty.

The rulings of the Court on the offers to prove and the charge of the Court, however, held in effect that as a matter of law there could be no such damages.

The statute referred to provides, in Section 1 (Appendix C of petitioners' brief, p. 34) for condemnation of an easement of flowage and the ascertainment of damage thereby; Section 3 (*ibid*, p. 35) directs the Secretary of War to investigate "all claims for damages caused, prior to the acquisition of the flowage easements under this Act, to the inhabitants of the United States by fluctuation of the water levels of the Lake of the Woods due to artificial obstructions * * * [to] ascertain and determine the loss or injury, if any, that may have been sustained by the respective claimants and to report to Congress for its consideration the amount or amounts he may find to be equitably due such claimants * * *."

Surely the privilege foreshadowed by this Act of recovering at the hands of Congress the amounts found to be "equitably due" for the actual physical "loss or injury" to the claimants' lands is in nowise impaired by the present decision. It may be that the Congress would be unlikely, in view of the

present decision, to award past damages on the theory that the lands intermittently affected by past flowage were valuable as segments of the reservoir site. The treaty and the act to carry it into effect never contemplated damages on that basis. The preamble of the treaty (44 Stat., pt. 3, 2108) accepts as a basis the Final Report of the International Joint Commisison. That report estimates the value of the lands affected at $164,000 (p. 39) not the "several hundreds of thousands of dollars" petitioner says are involved (Pet. Br. 12); and the Congress refused to prejudge the right to past damages at all (Hearings before House Committee on Foreign Affairs on H.R. 9872, 69th Cong., 1st sess., p. 28; 67 Cong. Rec. 7916, April 21, 1926).

No conflict of the present decision with the spirit or letter of the treaty and executing act can fairly be urged, *first,* because the decision does not preclude compensation for "loss or injury" "equitably due"; and *second,* because neither in letter nor in spirit did the treaty and act imply a right to reservoir values.

V

As Point V, petitioners allege:

> The Circuit Court of Appeals has decided an important question of local law in a way probably in conflict with applicable local decisions of the State of Minnesota.

The effect of multiplicity of titles on values dependent on unification has never been considered

by the Supreme Court of Minnesota. But in the very case cited by petitioner, *Conan* v. *City of Ely*, 91 Minn. 127, 97 N.W. 737, the landowner was held (in the passage quoted by petitioner) "entitled to the value of his property for any use * * * *for which it would ordinarily sell in the market.*" (Italics ours.)

If, as found by the lower courts, union of the required tracts did not have "that degree of probability or possibility which could affect the value of these lands and be an influence or consideration affecting, in the slightest degree, the minds of sellers and buyers thereof in arriving at a fair price therefor" (R. 428), it is plain that the *Conan* case would not require Minnesota courts to treat the use here alleged as a use "for which it [the property] would ordinarily sell in the market." It is unnecessary to discuss *Adams* v. *C. B. & N. R. Co.*, 39 Minn. 286, 39 N.W. 629, and *Minneapolis, St. Paul R. & D. Elec. T. Co.* v. *Searle*, 208 Fed. 122. They simply hold that an easement is property, and apparently petitioners' objective is to have the flowage easement valued as the "unit" of property taken. This claim is fully answered by Judge Stone (R. 420–423). There is no conflict between the instant decision and the local law of Minnesota.

CONCLUSION

The ultimate question presented by this case was simply whether the possibility of applying the lands to reservoir uses was too conjectural to influ-

ence market prices. The lower court held that the union of properties requisite for such use was so impracticable and speculative as to preclude any influence of reservoir utility on market price. This conforms with well settled principles announced by our Supreme Court, and in no way conflicts with local law or the decisions of other Circuit Courts of Appeals. Even in 1915, when the Court decided *New York* v. *Sage, supra,* it observed: "The decisions appear to us to have made the principles plain" (p. 61).

The Boundary Waters Treaty of 1909 has no bearing on the principles followed by the lower court, for the treaty expressly excludes "cases already existing". Moreover, the United States, by the Treaty of 1925, assumed all responsibility for any damage or injury which may have theretofore resulted to it or its inhabitants from fluctuations of the level of Lake of the Woods. Hence no question of American rights under the Treaty of 1909 is involved in the case.

If, however, the Treaty of 1909 did give Americans a right of action against the Canadian Government, the damages recoverable would still depend upon the market value of the property damaged; and to say the existence of a cause of action creates or tends to establish reservoir values is to beg the question. Obviously, therefore, no foreign treaty or relationship is involved in the present case.

The ruling of the lower court was made on the simple ground that testimony which is speculative and conjectural is inadmissible; and that the effect of potential uses on value is speculative if the use depends upon assembling and composing many hundreds of legal interests so varied and diverse as to make unification thereof utterly impracticable, and to preclude the possibility that such eventuality could influence, in the slightest degree, the minds of buyers and sellers of separate tracts in arriving at a fair price.

The law followed and applied by the courts below is so elementary as to make its reconsideration by this Court quite unnecessary. The only question certiorari would bring to this Court is whether, under the facts and circumstances here involved, the possible effect on value of potential reservoir uses of the lands was or was not too remote and speculative in fact to have any effect in law. That question, particularly in view of the prior decisions of this Court, is unworthy of review.

Respectfully submitted.

J. CRAWFORD BIGGS,
Solicitor General.

GEORGE C. SWEENEY,
Assistant Attorney General.

ALLEN E. DENTON,
Special Assistant to the Attorney General.

CLIFFORD E. FIX,
Attorney.

NOVEMBER 1933.

U. S. GOVERNMENT PRINTING OFFICE: 1933